

MT LEGISLATIVE HISTORY

Chapter 604 1989

Bill H (S) 166

Original bill & hist. ✓C

H. Committee on Judiciary

S. Committee on Agriculture, Livestock & Irrigation

Hearing Date(s) Mar 20 ✓C

Hearing Date(s) Feb 03 ✓C

 C

Feb 13 ✓C

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Date Out Mar 20 ✓C

Feb 14 ✓C

Did this bill originate in an interim committee? Yes No

Committee

Report

SENATE FINAL STATUS

1/17 INTRODUCED
 1/17 REFERRED TO STATE ADMINISTRATION
 1/23 HEARING
 1/26 COMMITTEE REPORT--BILL PASSED
 1/30 2ND READING PASSED 29 20
 2/01 3RD READING PASSED 27 23

TRANSMITTED TO HOUSE
 3/04 REFERRED TO LABOR & EMPLOYMENT RELATIONS
 3/21 HEARING
 3/22 TABLED IN COMMITTEE

SB 166 INTRODUCED BY BENGTSON, ET AL.
 PROVIDE FOR ADMINISTRATION OF TEMPORARY PRELIMINARY
 AND PRELIMINARY DECREES

1/17 INTRODUCED
 1/17 REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.
 1/19 FISCAL NOTE REQUESTED
 1/28 FISCAL NOTE RECEIVED
 1/30 FISCAL NOTE PRINTED
 2/03 HEARING
 2/14 COMMITTEE REPORT--BILL PASSED AS AMENDED
 2/16 2ND READING PASSED 42 1
 2/18 3RD READING PASSED 47 2

TRANSMITTED TO HOUSE
 2/21 REFERRED TO NATURAL RESOURCES
 2/27 REREFERRED TO JUDICIARY
 3/20 HEARING
 3/21 COMMITTEE REPORT--BILL CONCURRED AS AMENDED
 3/27 2ND READING CONCURRED 86 8
 3/29 3RD READING CONCURRED 82 16

RETURNED TO SENATE WITH AMENDMENTS
 4/03 2ND READING AMENDMENTS CONCURRED 50 0
 4/05 3RD READING AMENDMENTS CONCURRED 49 0

4/11 SIGNED BY PRESIDENT
 4/17 SIGNED BY SPEAKER
 4/18 TRANSMITTED TO GOVERNOR
 4/21 SIGNED BY GOVERNOR
 CHAPTER NUMBER 604 EFFECTIVE DATE: 4/21/89

SB 167 INTRODUCED BY BENGTSON, ET AL.
 REOPEN WATER RIGHT DECREES FOR OBJECTIONS ON ISSUES
 NOT PREVIOUSLY RESOLVED

1/17 INTRODUCED
 1/17 REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.
 1/19 FISCAL NOTE REQUESTED
 1/28 FISCAL NOTE RECEIVED
 1/30 FISCAL NOTE PRINTED
 2/03 HEARING
 2/14 COMMITTEE REPORT--BILL PASSED AS AMENDED
 2/16 2ND READING PASSED 48 0
 2/18 3RD READING PASSED 49 0

TRANSMITTED TO HOUSE

SENATE BILL NO. 166

INTRODUCED BY BENGTON, GALT, STORY, STIMATZ,
SPAETH, MARKS, BRADLEY, IVERSON

IN THE SENATE

JANUARY 17, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION.
	FIRST READING.
FEBRUARY 14, 1989	COMMITTEE RECOMMEND BILL DO PASS AS AMENDED. REPORT ADOPTED.
FEBRUARY 15, 1989	PRINTING REPORT.
FEBRUARY 16, 1989	SECOND READING, DO PASS.
FEBRUARY 17, 1989	ENGROSSING REPORT.
FEBRUARY 18, 1989	THIRD READING, PASSED. AYES, 47; NOES, 2.
	TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 18, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON NATURAL RESOURCES.
FEBRUARY 20, 1989	FIRST READING.
FEBRUARY 27, 1989	ON MOTION, REREFERRED TO COMMITTEE ON JUDICIARY.
MARCH 21, 1989	COMMITTEE RECOMMEND BILL BE CONCURRED IN AS AMENDED. REPORT ADOPTED.
MARCH 27, 1989	SECOND READING, CONCURRED IN.
MARCH 29, 1989	THIRD READING, CONCURRED IN. AYES, 82; NOES, 16.
	RETURNED TO SENATE WITH AMENDMENTS.

IN THE SENATE

APRIL 3, 1989

RECEIVED FROM HOUSE.

SECOND READING, AMENDMENTS
CONCURRED IN.

APRIL 5, 1989

THIRD READING, AMENDMENTS
CONCURRED IN.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

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SENATE BILL NO. 166

INTRODUCED BY *Bington Hall Story Strong*
Spaeth Marks Bradley Iverson

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR ADMINISTRATION OF TEMPORARY PRELIMINARY AND PRELIMINARY DECREES BY THE DISTRICT COURTS; PROVIDING THAT FOR PURPOSES OF ADMINISTERING WATER RIGHTS, THE PRIMA FACIE STATUS OF A CLAIM IS SUPERSEDED BY THE ISSUANCE OF A TEMPORARY PRELIMINARY DECREE, AS MODIFIED AFTER OBJECTIONS AND HEARINGS, OR A PRELIMINARY DECREE; AMENDING SECTIONS 3-7-201, 3-7-211, 3-7-212, 3-7-501, 85-2-227, 85-2-406, AND 85-5-101, MCA; REPEALING SECTION 3-7-213, MCA; AND PROVIDING AN EFFECTIVE DATE AND RETROACTIVE AND PROSPECTIVE APPLICABILITY."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 3-7-201, MCA, is amended to read:

"3-7-201. Designation of water judge. (1) A water judge shall be designated within 30 days after May 11, 1979, for each water division by a majority vote of a committee composed of the district judge from each single judge judicial district and the chief district judge from each multiple judge judicial district, wholly or partly within the division. Except as provided in subsection (2) and 3-7-213, a water judge must be a district judge or retired

district judge of a judicial district wholly or partly within the water division.

(2) A district judge or retired district judge may sit as a water judge in more than one division if requested by the chief justice of the supreme court or the water judge of the division in which he is requested to sit.

(3) A water judge, when presiding over a water division, presides as district judge in and for each judicial district wholly or partly within the water division."

Section 2. Section 3-7-211, MCA, is amended to read:

"3-7-211. Appointment of water commissioners. The water-judge-of-each-water-division district court having jurisdiction over the subbasin in which the controversy arises may appoint and supervise a water commissioner as provided for in Title 85, chapter 5."

Section 3. Section 3-7-212, MCA, is amended to read:

"3-7-212. Enforcement of final-decree decrees. The water-judge-of-each-water-division district court having jurisdiction over the subbasin in which a controversy arises may enforce the provisions of a final decree issued in for that water-division-as-provided-in-85-2-234 subbasin or, in the absence of any final decree having been issued, the provisions of a temporary preliminary decree or preliminary decree entered under 85-2-231."

Section 4. Section 3-7-501, MCA, is amended to read:

"3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly.

(2) No water judge may preside over matters concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights beyond the boundaries specified in 3-7-102 for his division except as provided in 3-7-201 and 3-7-213.

(3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under 85-2-309 or concerning the determination and interpretation of existing water rights within his division as specified in 3-7-102 that are considered filed in or transferred to a judicial district wholly or partly within the division."

Section 5. Section 85-2-227, MCA, is amended to read:

"85-2-227. Claim to constitute prima facie evidence. A For purposes of adjudicating rights pursuant to this chapter, a claim of an existing right filed in accordance with 85-2-221 constitutes prima facie proof of its content

until the issuance of a final decree. For purposes of administering water rights, the provisions of a temporary preliminary decree, as modified after objections and hearings, or a preliminary decree supersede a claim of existing right until a final decree is issued."

Section 6. Section 85-2-406, MCA, is amended to read:

"85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to part 2 of this chapter, any party to the controversy may petition the district court for relief. The district court from which relief is sought may grant ~~such injunctive or--other~~ relief which is necessary and appropriate to preserve property rights or the status quo pending the issuance of the final decree resolution of the controversy under subsection (3).

(3) A controversy between appropriators ~~from a source which has been the subject of a general determination of existing rights under part 2 of this chapter~~ shall be

1 settled by the district court ~~which issued the final decree~~
 2 having jurisdiction over the subbasin in which the
 3 controversy arises. The order of the district court settling
 4 the controversy may not alter the existing rights and
 5 priorities established in ~~the final decree~~ a temporary
 6 preliminary decree or preliminary decree entered under part
 7 2 of this chapter but shall refer to the appropriate water
 8 court any portion of the controversy involving the nature of
 9 existing rights and priorities established in a temporary
 10 preliminary decree or preliminary decree. The water court
 11 shall resolve any controversy involving existing rights and
 12 priorities established in a temporary preliminary decree or
 13 preliminary decree. Upon rereferral from the water court,
 14 the district court shall enter an order that it determines
 15 to be consistent with the resolution of the issues referred
 16 by the water court. In resolving the controversy, the
 17 district court may alter rights and priorities contained in
 18 a final decree only if based upon abandonment, waste, or
 19 illegal enlargement or change of right. In cases involving
 20 permits issued by the department, neither the water court
 21 nor the district court may not amend the respective rights
 22 established in the permits or alter any terms of the permits
 23 unless the permits are inconsistent or interfere with rights
 24 and priorities established in the a final decree entered
 25 under part 2 of this chapter. The order settling the

1 controversy shall be appended to the ~~final~~ decree, and a
 2 copy shall be filed with the department. The department
 3 shall be served with process in any proceeding under this
 4 subsection, and the department may, in its discretion,
 5 intervene in the proceeding."

6 **Section 7.** Section 85-5-101, MCA, is amended to read:

7 "85-5-101. Appointment of water commissioners. (1)
 8 Whenever the rights of persons to use the waters of any
 9 stream, ditch or extension of ditch, watercourse, spring,
 10 lake, reservoir, or other source of supply have been
 11 determined by a decree of a court of competent jurisdiction,
 12 it shall be the duty of the judge of the district court
 13 having jurisdiction of the subject matter, upon the
 14 application of the owners of at least 15% of the water
 15 rights affected by the decree, in the exercise of his
 16 discretion, to appoint one or more commissioners. The
 17 commissioners shall have authority to admeasure and
 18 distribute to the parties owning water rights in the source
 19 affected by the decree the waters to which they are
 20 entitled, according to their rights as fixed by the decree
 21 and by any certificates and permits issued under chapter 2
 22 of this title. When petitioners make proper showing that
 23 they are not able to obtain the application of the owners of
 24 at least 15% of the water rights affected and they are
 25 unable to obtain the water to which they are entitled, the

1 judge of the district court having jurisdiction may, in his
2 discretion, appoint a water commissioner.

3 (2) When the existing rights of all appropriators from
4 a source or in an area have been determined in a temporary
5 preliminary decree, preliminary decree, or final decree
6 issued under chapter 2 of this title, the judge of the
7 district court shall upon application by the department of
8 natural resources and conservation appoint a water
9 commissioner. The water commissioner shall distribute to the
10 appropriators, from the source or in the area, the water to
11 which they are entitled.

12 (3) The department of natural resources and
13 conservation or any person or corporation operating under
14 contract with the department or any other owner of stored
15 waters may petition the court to have such stored waters
16 distributed by the water commissioners appointed by said
17 court. The court may thereupon make an order requiring the
18 commissioner or commissioners appointed by the court to
19 distribute such stored water when and as released to water
20 users entitled to the use thereof.

21 (4) At the time of the appointment of such water
22 commissioner or commissioners, the district court shall fix
23 their compensation, and the owners and users of the
24 distributed waters, including permittees and certificate
25 holders, shall pay their proportionate share of such fees

1 and compensation.

2 (5) Upon the application of the board or boards of one
3 or more irrigation districts entitled to the use of water
4 stored in a reservoir which is turned into the natural
5 channel of any stream and withdrawn or diverted at a point
6 downstream for beneficial use, the district court of the
7 judicial district wherein the most irrigable acres of the
8 irrigation district or districts are situated may appoint a
9 water commissioner to equitably admeasure and distribute
10 such stored water to said irrigation district or districts
11 from the channel of the stream into which it has been
12 turned. A commissioner appointed under this subsection has
13 the powers of any commissioner appointed under this chapter,
14 limited only by the purposes of this subsection. His
15 compensation is set by the appointing judge and paid by each
16 district and other users of stored water affected by the
17 admeasurement and distribution of such stored water. In all
18 other matters the provisions of this chapter apply so long
19 as they are consistent with this subsection."

20 NEW SECTION. **Section 8.** Repealer. Section 3-7-213,
21 MCA, is repealed.

22 NEW SECTION. **Section 9.** Saving clause. [This act]
23 does not affect rights and duties that matured, penalties
24 that were incurred, or proceedings that were begun before
25 [the effective date of this act].

1 NEW SECTION. **Section 10.** Severability. If a part of
2 [this act] is invalid, all valid parts that are severable
3 from the invalid part remain in effect. If a part of [this
4 act] is invalid in one or more of its applications, the part
5 remains in effect in all valid applications that are
6 severable from the invalid applications.

7 NEW SECTION. **Section 11.** Retroactive and prospective
8 applicability. [This act] applies retroactively, within the
9 meaning of 1-2-109, to all temporary preliminary decrees and
10 preliminary decrees that have been issued by the Montana
11 water courts and prospectively to all decrees issued on or
12 after [the effective date of this act].

13 NEW SECTION. **Section 12.** Effective date. [This act]
14 becomes effective on the latest date on which any of the
15 following occurs:

16 (1) passage and approval of [this act], __ Bill No. __
17 [LC 683], __ Bill No. __ [LC 685], or __ Bill No. __ [LC
18 686]; or

19 (2) a final determination of failure to receive
20 passage and approval of __ Bill No. __ [LC 683], __ Bill No.
21 __ [LC 685], or __ Bill No. __ [LC 686].

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for SB166, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

An act providing for administration of temporary preliminary and preliminary decrees by the district court, and providing an effective date and retroactive and prospective applicability.

ASSUMPTIONS:

1. This bill has no impact on the Department of Natural Resources and Conservation (DNRC) as currently written.
2. This bill has no impact on the Judiciary as currently written.

FISCAL IMPACT:

None

TECHNICAL NOTES:

1. In Section 85-2-406, MCA, the administration of temporary preliminary and preliminary decrees could involve all parties to a decree or only those parties that petition district court for relief. This section as currently written is unclear whether modified decrees must be issued and basin-wide notice given to have an administrable decree.

If all or a portion of the parties in a basin are to be included in an administrable decree, either the district court or the water court may need to notice all or a portion of the water right owners in the particular basin where the temporary preliminary or preliminary decree will now be enforced. The water court may require that a modified temporary preliminary or preliminary decree be issued showing the resolution of the objections. If this occurs there will be a fiscal impact to the DNRC because the cost for printing and mailing the decree and notice is borne by the department.

The general fund cost to DNRC would average \$5,000 per enforceable basin decreed (average basin size of 2,000 claims x \$2.50 average cost for preparing and mailing each claim).

2. It is not possible to confidently estimate fiscal impact to the DNRC from this bill because it is unknown how often the district court will be petitioned. Therefore, it is uncertain what department assistance may be required by the water court to issue a modified enforceable temporary preliminary or preliminary decree.

Ray Shackelford 1/28/89
RAY SHACKLEFORD, BUDGET DIRECTOR DATE
OFFICE OF BUDGET AND PROGRAM PLANNING

Esther G. Bengtson 1-28-89
ESTHER G. BENGTSON, PRIMARY SPONSOR DATE

Fiscal Note for SB166, as introduced

SB 166

CHAIRMAN--TOM BECK
SECRETARY-JAELENE JOHNSON
NORMAL SCHEDULE==> SITE: ROOM 413/415

COMMITTEE--(S) AGRICULTURE
DAYS: M,W,F TIME: 1:00 P.M.

OFFICE--ROOM 439

REFER NOTE: BILL WILL BE LISTED TWICE IF REREFERRED BACK TO THE SAME COMMITTEE
BILL ==== DATE === LATEST DATE/ACTION ON BILL =====

SB 13	01/02 04/24--TABLED IN COMMITTEE SPONSOR: WEEDING, CECIL	TITLE-INTERSTATE COMPACT ON AGRICULTURAL GRAIN MARKETING
SB 28	01/02 03/08--(H) TABLED IN COMMITTEE SPONSOR: MEYER, DARRYL	(H) AGRICULTURE, LIVESTOCK & IRRIG TITLE-CLARIFY DEFINITION OF VETERINARY MEDICINE
SB 32	01/02 04/24--TABLED IN COMMITTEE SPONSOR: JENKINS, LOREN	TITLE-PROVIDE DISTRIBUTION OF CONSERVATION RESERVE PROGRAM RENTAL PAYMENTS
SB 32	01/12 04/24--TABLED IN COMMITTEE SPONSOR: JENKINS, LOREN	TITLE-PROVIDE DISTRIBUTION OF CONSERVATION RESERVE PROGRAM RENTAL PAYMENTS
SB 57	01/03 03/20--(S) CHAPTER NUMBER SPONSOR: JENKINS, LOREN	EFFECTIVE DATE: 03/18/89 TITLE-AMEND CUSTOM COMBINERS' TAX
SB 81	01/07 03/22--(S) CHAPTER NUMBER SPONSOR: PINSONEAULT, DICK	<i>1/10 rereferred to Highways</i> EFFECTIVE DATE: 03/22/89 TITLE-CONTINUE PROVISION PRECLUDING HIGHWAY RESTRICTIONS ON HAULING AGRI. SEEDS
SB 111	01/18-25 04/25--(S) SIGNED BY PRESIDENT SPONSOR: BOYLAN, PAUL	TITLE-GENERALLY REVISE PRACTICE OF VETERINARY MEDICINE
SB 111	02/13 04/25--(S) SIGNED BY PRESIDENT SPONSOR: BOYLAN, PAUL	TITLE-GENERALLY REVISE PRACTICE OF VETERINARY MEDICINE
SB 166	01/17 04/21--(S) CHAPTER NUMBER SPONSOR: BENGTSON, ESTHER	EFFECTIVE DATE: 04/21/89 TITLE-PROVIDES FOR ADMINISTRATION OF TEMPORARY PRELIMINARY AND PRELIMINARY DECREES
SB 167	01/17 04/20--(S) CHAPTER NUMBER SPONSOR: BENGTSON, ESTHER	EFFECTIVE DATE: 04/21/89 TITLE-REOPENS WATER RIGHT DECREES FOR OBJECTIONS ON ISSUES NOT PREVIOUSLY RESOLVED
SB 168	01/17 04/04--(S) CHAPTER NUMBER SPONSOR: BENGTSON, ESTHER	EFFECTIVE DATE: 10/01/89 TITLE-ALLOWS CORRECTION OF CLERICAL MISTAKES IN FINAL DECREES OF WATER RIGHTS
SB 169	01/17 04/21--(S) CHAPTER NUMBER SPONSOR: BENGTSON, ESTHER	EFFECTIVE DATE: 04/21/89 TITLE-PROVIDES FOR TEMPORARY PRELIMINARY DECREES AND FOR OBJECTIONS ON THE DECREES
SB 176	01/18 03/20--(S) CHAPTER NUMBER SPONSOR: DEVLIN, GERRY	EFFECTIVE DATE: 10/01/89 TITLE-IMPOSE \$25 LATE PAYMENT PENALTY ON STATE AGRICULTURAL AND GRAZING LEASES
SB 183	01/18 03/18--(S) CHAPTER NUMBER SPONSOR: ABRAMS, HUBERT	EFFECTIVE DATE: 03/18/89 TITLE-INCLUDES LITTLE MISSOURI RIVER BASIN IN THE WATER RESERVATION PROCESS
SB 213	01/21 03/20--(S) CHAPTER NUMBER SPONSOR: HOFMAN, SAM	EFFECTIVE DATE: 10/01/89 TITLE-INCREASING THE ALLOWABLE SEED OR GRAIN LIEN TO AMOUNT OF PURCHASE PRICE
SB 222	01/25 03/20--(S) CHAPTER NUMBER SPONSOR: TVEIT, LARRY	EFFECTIVE DATE: 10/01/89 TITLE-PASSING OF TITLE TO CATTLE FROM AUCTION YARD
SB 228	01/25 04/24--TABLED IN COMMITTEE SPONSOR: HAGER, TOM	TITLE-KILLING DOGS THAT DESTROY OR MAIM POULTRY
SB 233	01/25 03/20--(S) CHAPTER NUMBER SPONSOR: MANNING, DICK	EFFECTIVE DATE: 03/20/89 TITLE-AUTHORIZE MULE RACING
SB 254	01/26 04/24--TABLED IN COMMITTEE	

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on February 3, 1989,
at 1:00 P.M.

ROLL CALL

Members Present: Senators: Hubert Abrams, Gary Aklestad,
Esther Bengtson, Gerry Devlin, Jack Galt, Greg
Jergeson, Gene Thayer, Bob Williams, and Chairman Beck

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council
Debbie Thompson transcribed the minutes

Announcements/Discussion: None

HEARING ON SENATE BILL 169

Presentation and Opening Statement by Sponsor: Senator
Bengtson presented the water rights bills as a package.
She presented testimony on Some Basics concerning the
Water Rights Adjudication Process (Exhibit 1). She
said this explained the division of the Montana water
courts, the current adjudication laws, review of
claims, and the issuing of decrees by the water courts.

Senator Bengtson discussed the water rights adjudication
bills by request of the Water Policy Committee (Exhibit
2). She explained the hiring of the consultant firm of
Saunders, Snyder, Ross & Dickson to evaluate the
adjudication process and make recommendations. She
said the package of four bills, SB 169, SB 166, SB 167,
and SB 168 were a result of these recommendations.

List of Testifying Proponents and What Group They Represent:

Jack Ross representing Saunders, Snyder, Ross & Dickson
Jo Brunner representing Montana Water Resource
Committee
Carol Mosher representing Montana Stockgrowers and
CattleWomen and the Montana Association of State

to throw it out. The state-based claimants are going to have an opportunity at the preliminary decree stage to object to that. Also at that time your federal and Indian rights claimants also have an opportunity to object to any state-based claim they want. Again there has to be good cause for their objection."

Closing by Sponsor:

Senator Bengtson said the reason is to cooperate with the water courts and get some finality to these decrees. "The big problem was whether the water courts were making any progress. The objections that were being filed by the departments of state agencies was part of the problem. We have addressed this as trying to get the job done. It is expansion of the notice, taking into account those subbasins. They are all interrelated. We have addressed the problem and will consider taking out some of the language. However, I object to taking out the language that says that after you have had your objections litigated that you should not be able to reopen that. That means that can go on and on forever. We have to have some finality."

HEARING ON SENATE BILL 166

Presentation and Opening Statement by Sponsor:

Senator Bengtson said this bill enables the District Court to administer or enforce water rights according to a temporary preliminary decree as modified after hearings and objections or a preliminary decree under existing law, so that final decrees may be administered, thereby, emphasizing the court's adjudicating function. The water courts will not be administering the decree, it will be the District Court. Sections 1 and 8 strike references to section 3-7-213, which provides for designation of all the judges by the water judge from the population of District Court and retired District Court Judges. This change still allows a water judge from another division to sit as water judge if requested by the Chief Justice of the Supreme Court or the water judge pursuant to subsection (2) of this section. That language is a little bit hard to understand. It takes away the ability of the water judge to

appoint an alternate judge for himself. It has to be one of the existing water judges, so there is a choice of three water judges than can be appointed to be an alternate judge. Section 8 actually repealed that one section, then it puts the description in subsection (2) of section 1. Section 2 is amended so that the exclusive authority for administration of decrees lies with the District Court and not the water court. The amendment emphasizes the role of the water court that is adjudicating existing water rights, not administering water rights. Water commissioners appointed by the District Court have authority to distribute water according to the terms of the decree. Section 3 is fundamental to this bill. Note that District Court has jurisdiction and the court can administer not only a final decree but also temporary preliminary and preliminary decrees. In section 5, under existing law, a properly filed claim of existing rights constitutes prima facie proof of its content until a final decree is issued. This amendment modifies the final face of status of a claim or administers only by stating the claim is superseded by issuance of a temporary preliminary decree as modified after hearings and objections or by a preliminary decree. The change ensures that the rights will be administered according to the most accurate determination available. Section 6, this section describes the process for resolving water distribution controversy. Again the district supervises this process; however, if the matter involves a preexisting July 1, 1973, water right that has not been adjudicated in the final decree, the power of the controversy involving the determination of the pre-1973 right is referred to the water courts. The water court resolves the matter and then refers it back to the District Court for conclusion with other matters within the controversy. The District Court then administers the decree. It just sets up a process. Section 7, note the amendment in subsection (2) which provides for appointment of water commissioners upon application by DNRC and areas or basins that have a temporary preliminary decree, preliminary decree, or final decree. Subsection (1), which provides for a water commissioners upon petition of water right holders, is not amended because it references "any decree".

List of Testifying Proponents and What Group They Represent:

Jack Ross representing Saunders, Snyder, Ross, and Dickson

Don MacIntyre representing the Department of Natural
Resources and Conservation

Jo Brunner representing the Montana Water Resource Committee

List of Testifying Opponents and What Group They Represent:

Carol Mosher Representing the Montana Stockgrowers and
CattleWomen and the Montana Association of State
Grazing Districts

Ed Steinmetz representing the Montana Water Court

Testimony:

Proponents:

Jack Ross testified for SB 166. He said it was the second piece of the package of legislation proposed to the Water Policy Committee. The whole purpose of that bill is to make it possible for those who have water rights that have not been finally adjudicated under old decrees or have not reached a final decree stage or enjoy the administration of those streams where water supply gets so slow that someone has to have administration. Old law says you have a right to administration only when you have a final decree under the old terms. This bill will change that and make it possible for people that have been through the process to get relief when water is short and it provides it in recognition of the fact that the adjudication process under SB 76 is going to take some time to complete. During that period of time, those people have the opportunity to get administration if they need it and the water supply is short. That is the basic purpose of the bill and the objections we are trying to reach. I would address only one other point and that has to do with the question of the jurisdiction between water courts and District Courts. As we looked at the existing statute we found that the existing program was for concurrent jurisdiction in both courts for administration. It is simpler to have the controversy and all the administration handled by the District Court that has jurisdiction over the area where controversy arises. There is a problem here in those cases where the issues involving the adjudication of the

water right have not been resolved. The statute provides a basis for the District Court referring those questions to the water court where they have special expertise in those matters.

Mr. Don MacIntyre, representing the Department of Natural Resources, spoke in support of SB 166. He said the department supports the bill and feels that it is the most critical bill coming before the legislature.

Jo Brunner offered some amendments to SB 166. See exhibit 5.

Testimony:

Opponents:

Carol Mosher-See exhibit 6.

Ed Steinmetz-See exhibit 10.

Questions From Committee Members: Questions were limited due to the lack of time.

Closing by Sponsor: Senator Bengtson closed.

HEARING ON SENATE BILL 167

Presentation and Opening Statement by Sponsor: Senator Bengtson stated, "With certain limitations this bill reopens all temporary preliminary decrees, preliminary decrees, and final decrees that have been issued by the water courts for reexamination and objections. Section 1 of the bill would be a new section in Title 85, chapter 2, part 2, this is the adjudication laws." See exhibit 2.

List of Testifying Proponents and What Group They Represent:

Jack Ross representing the Water Policy Committee from the Firm of Saunders, Snyder, Ross, and Dickson

List of Testifying Opponents and What Group They Represent:

Ed Steinmetz representing the Montana Water Court
Jo Brunner representing the Montana Water Resource Committee
Don MacIntyre representing the Department of Natural Resources and Conservation
Carol Mosher representing the Montana Stockgrowers

ROLL CALL

AGRICULTURE COMMITTEE

DATE 2/3/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSON	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

SOME BASICS CONCERNING THE WATER RIGHTS ADJUDICATION PROCESS

February 1989

1. The Montana Water Courts are organized into four divisions:

- the Upper Missouri River Basin (Chief Judge W.W. Lessley);
- the Lower Missouri River Basin (Judge Bernard W. Thomas);
- the Clark Fork River Basin (Judge Leif Erickson); and
- the Yellowstone River Basin (Judge Roy C. Rodeghiero).

2. The current adjudication laws went into effect with the passage of Senate Bill 76 in 1979. The deadline for filing claims of existing (pre-July 1, 1973) rights was April 30, 1982. Over 203,000 claims were filed.

3. Since 1982, the Water Courts have been reviewing the claims and issuing decrees in various subbasins. There are 85 subbasins in Montana.

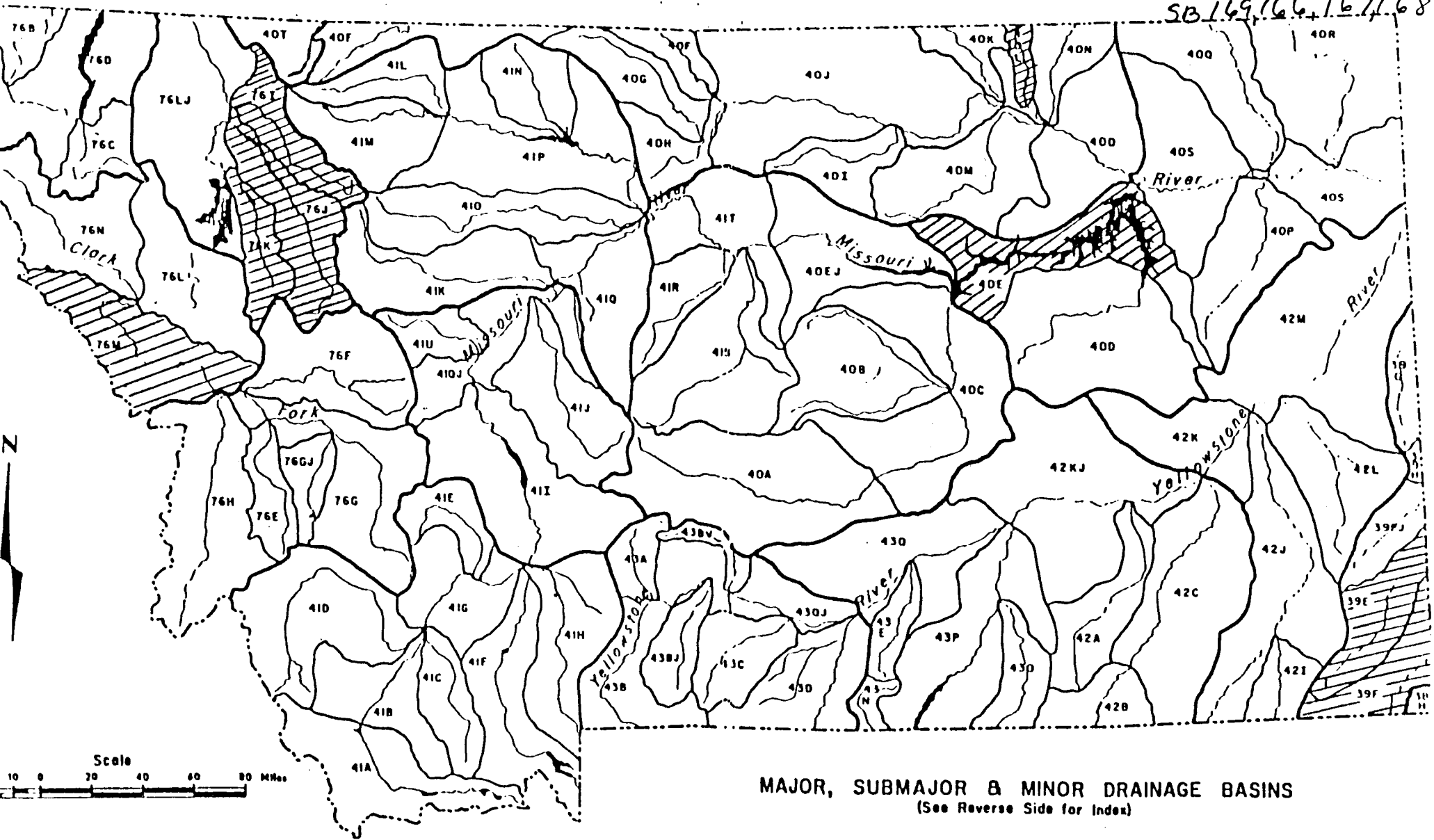
4. The Water Courts issue three types of decrees. A temporary preliminary decree is issued for non-federal and Indian claims in any basin where the federal and Indian claims remain unresolved because of negotiations with the Reserved Water Rights Compact Commission. A preliminary decree is issued when all claims (state-based and federal and Indian claims) are before the court. Senate Bill 169 ensures that both of these decrees are subject to extensive notice and opportunity for objections and hearings.

Finally, after considering all objections and the evidence before it, the Water Court issues a final decree.

5. The Department of Natural Resources and Conservation is required to assist the Water Courts. The DNRC's functions include maintaining the data base and examining claims for accuracy. Claim examination normally involves in-house review, including air photo interpretation, but can at times involve examination by field office staff at the site of the claim.

6. With funding from a special appropriation, the Water Policy Committee hired Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado to examine the water rights adjudication process to determine if it is legally adequate, particularly if a challenge occurred under the McCarran Amendment (which allows states to adjudicate federal and Indian claims).

2/3/89
SB 169, 166, 167, 168



MAJOR, SUBMAJOR & MINOR DRAINAGE BASINS
(See Reverse Side for Index)

The Water Rights Adjudication Bills
By Request of the Water Policy Committee SB 167 SB 168
Senator Esther Bengtson, sponsor

The Water Policy Committee's principal agenda item for the 1987-1989 interim was Montana's water rights adjudication process. This focus resulted from an appropriation by the 1987 Legislature to hire a consultant with no conflict of interest to review and analyze the adjudication process.

The consultant -- Saunders, Snyder, Ross & Dickson, P.C. of Denver, Colorado -- evaluated the adjudication process for over a year and delivered a comprehensive set of recommendations. Many of the recommendations stressed very positive aspects of the current adjudication, assuring the committee that the the process is not "so grievously flawed as to require a massive legislative overhaul." The consultant did, however, recommend some minor legislative fine-tuning to ensure the results sought by the legislature in 1979 are achieved.

The committee seriously considered the consultant's recommendations and proposed legislation. The result of its deliberations is contained in the committee report and a legislative package of four bills.

I. Senate Bill 169

Senate Bill 169 provides explicitly that the Water Courts may issue temporary preliminary decrees (a practice already occurring) and makes certain modifications to the notice requirements and to the objections and hearings process.

Section 1

Subsection 5 states that a temporary preliminary decree may be issued in a basin where adjudication of federal and Indian claims is precluded by the suspension under 85-2-217. The suspension is provided so that the Reserved Water Rights Compact Commission may attempt to negotiate a settlement of these rights with the various federal and Indian entities.

Subsection 6 describes the relationship between the temporary preliminary decree and preliminary decree. The temporary preliminary decree must be used in issuing the preliminary decree, but upon issuance the preliminary decree supercedes the temporary preliminary decree.

Section 2

This section describes new notice requirements for temporary preliminary decrees and preliminary decrees. Notice by mail must be sent to each person or entity with a claim, permit or

reservation in the subbasin at issue. In addition, notice of the decree's availability must be published in at least 3 newspapers geographically distributed in the general basin in which the subbasin is located.

Section 3

The hearings process is identical for temporary preliminary and preliminary decrees. As stated in subsection (1) of the bill, the DNRC and persons within the entire basin, including the subbasin, may object to claims in the decree at issue. However:

no objection seeking to reopen and review any matter previously litigated and resolved as a result of any previous objection process is allowed." (p. 2, lines 4-6)

The exception provided for the federal government and the Indian tribes is necessary because of the ongoing negotiations with these entities by the Reserved Water Rights Compact Commission.

Subsection 2 extends the time period for filing objections and requests for hearing to 180 days after notice is given of the decrees. Two 90-day extensions, for good cause shown, are also provided. This helps to ensure that adequate time is available for interested parties to review the decree.

The amendments in the remainder of the section simply apply existing law to temporary preliminary decrees.

The effective date for this bill and Senate Bills 166, 167, and 168 is when the last bill is passed and approved (or killed).

II. Senate Bill 166

This bill enables the district courts to administer or enforce water rights according to a temporary preliminary decree, as modified after hearings and objections, or a preliminary decree. Under existing law, only final decrees may be administered.

The bill also removes water rights administration from the water courts, thereby emphasizing the courts' principal adjudication function.

Sections 1, 4 and 8

Sections 1 and 8 strike references to section 3-7-213, MCA, which provides for designation of alternate judges by the water judge from the population of district court and retired district court judges. This change still allows a water judge from another division to sit as a water judge if requested by the chief justice of the Supreme Court or the water judge pursuant to subsection (2) of this section.

Section 2

Section 3-7-211 is amended so that exclusive authority for administration of decrees lies with the district courts and not the water courts. The amendment emphasizes the role of the water courts in adjudicating existing water rights, not administering water rights. Water commissioners appointed by the district court have authority to distribute water according to the terms of the decree.

Section 3

"This section is fundamental to this bill. Note that the district court has jurisdiction and that the court can administer not only a final decree but also temporary preliminary and preliminary decrees."

Section 5

Under existing law (85-2-227), a properly filed claim of existing right constitutes prima facie proof of its content until a final decree is issued. This amendment modifies the prima facie status of a claim for administration purposes only by stating that the claim is superceded by the issuance of a temporary preliminary decree as modified after hearings and objections or by a preliminary decree. The change ensures that rights will be administered according to the most accurate determination available.

Section 6

This section describes a process for resolving water distribution controversies. Again, the district courts supervise this process. However, if the matter involves an existing (pre-July 1, 1973) water right that has not been adjudicated in a final decree, the part of the controversy involving the determination of the pre-1973 right is referred to the water courts. The water court resolves the matter and then refers it back to the district court for inclusion with other matters concerning the controversy. The district court then administers the decree.

Section 7

Note the amendment to subsection (2), which provides for appointment of water commissioners upon application by the DNRC in areas or basins that have a temporary preliminary decree, preliminary decree or final decree. Subsection (1), which provides for water commissioners upon petition of water right holders, is not amended because it references any "decree".

Cx. #2
2/3/89

IV. Senate Bill 168

This bill adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

1
III. Senate Bill 168

With certain limitations, this bill reopens all temporary preliminary decrees, preliminary decrees, and final decrees that have been issued by the Water Courts for reexamination and objections. Section 1 of the bill would be a new section in Title 85, chapter 2, part 2 (the adjudication laws).

Subsection 1

This subsection calls for reopening of all decrees within 180 days after this bill is enacted.

Subsection 2

The notice and hearings process is identical to the process provided for temporary preliminary and preliminary decrees. The DNRC, and persons within the entire basin (including the subbasin) may object to claims in the decree at issue. However:

no objection seeking to reopen and review any matter previously litigated and resolved as a result of any previous objection process is allowed." (p. 2, lines 4-6)

The exception provided for the federal government and the Indian tribes is necessary because of the ongoing negotiations with these entities by the Reserved Water Rights Compact Commission.

Subsections 3 and 4

Notice requirements for the reopening of a decree is identical to notice provided for new temporary preliminary and preliminary decrees (see section 2, Senate Bill 169).

Subsection 5

A 180-day time period, with possibly two 90-day extensions, is provided for objections. Again, this matches the time period for new temporary preliminary and preliminary decrees (see section 2, Senate Bill 169).

Subsections 6 and 7

Subsection 6 ensures notice to claimants of objections to their claims. Subsection 7 allows the water judge to dismiss the objection or to modify claims based on the evidence before him.

Subsections 8

Appeals are allowed from the final decree. An appeal from a temporary preliminary or preliminary decree may occur when the applicable decree becomes a final decree.

20

SENATE AGRICULTURE

EXHIBIT NO. 5

DATE 2/3/89

BILL NO. SB166

Brunner

Senate Bill 166 - Amendments - MURA

page 4 - paragraph 2 line 19 - leave in - or other relief

page 6 - Section 7, line 11 - after the words - by a -

insert the words temporary preliminary preliminary and
final decree -

Go Brunner

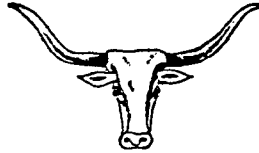
MONTANA STOCKGROWERS ASSOCIATION, INC.

P.O. BOX 1679 — 420 NO. CALIFORNIA ST. — PHONE (406) 442-3420 — HELENA, MONTANA 59624

AGRICULTURE

OFFICERS:

WM J. BROWN, JR.	SAND SPRINGS	PRESIDENT
JAMES COURTNEY	ALZADA	FIRST VICE PRESIDENT
EDWARD J. LORD	PHILIPSBURG	SECOND VICE PRESIDENT
JEROME W. JACK	HELENA	EXECUTIVE VICE PRESIDENT
KIM ENKERUD	HELENA	NATURAL RESOURCES COORDINATOR



EXECUTIVE COMMITTEE:

CLARENCE BLUNT	REGINA	WM. T. HARRER	JOEY BENTON
BILL CHRISTENSEN	HOT SPRINGS	DATE HEREIN	MARTINDALE
LYNN CORNWELL	GLASGOW	EARL LINDGREN	JULIE
M.E. EDDLEMAN	WORDEN	ROLAND MOSHER	AUGUSTA
NANCY ESPY	BOYES	BILL NO.	HARRISON

EXHIBIT NO. 6

February 3, 1989

Mr. Chairman and Members of the Senate Agriculture Committee

My name is Carol Mosher and today I am representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts.

We oppose Senate Bill 166. This situation is rather like a double edged knife. We feel that many District Court judges are not knowledgeable on water issues but that, on the other hand, the Water Court is so backlogged that it may be difficult to get a decision from them. We have more trust in Water Court judges than District Court judges in matters of water.

Thank you for the opportunity to testify in opposition of this bill.

Carol Mosher

SB 166 - Admin. of Decrees by Dist. Ct.

CHANGES:

- ① Abolishes WT ^{Judges} authority to administer final Decrees and appoint Water Commissioners.
- ② New Dist. Cts. responsible for administering all decrees (T.P., P. & F.) and exclusive authority to appoint water commissioners.
- ③ Alters prima facie status administration.
- ④ Section 6 (85-2-406) Dist. Ct. relief restricted to injunctive relief. Status quo preserved only until resolved under subsection (3).
- ⑤ Subsection (3) Dist. Ct. shall settle controversy. At T.P. or decree, issues referred to WT CT for resolution. (No finality.)

COMMENTS

1. Advantages of WT CT Judges vs. Dist. Ct. Judges (why change the present law?)
2. No need to restrict judicial relief to injunctive.
3. Neither Dist. Ct. nor WT CT can settle or resolve controversies between appropriators until Final Decree. Current law allows judicial order to preserve status quo until Final Decree.
4. Under Sec. 7, (85-5-101) Claimants and appropriators should have procedure to petition Court directly for administration of T.P., P. or Final decrees.

5B 166

EXHIBIT # 9
2/3/89

Admin of Decrees by Dist Ct:

- Water use is unique - many uses are mutually interrelated. Water is adjudicated by division (entire source) because of interrelatedness and need for wide-scope view.

WT Division Judges

- Currently district ct or retired judges required. Chosen because of their knowledge and interest in water related issues.
- Wide view (division wide). Can better understand effects on all users on a
- These are the judges who have issued decrees which are to be enforced.
- Only 4 judges - become specialists.
- WTKT offices in Bozeman would be closed once adjudication completed.
- WT Judges can already call in local Dist. Ct. judge.

Dist. Ct Judges

- More physically accessible to the water users.
- 20 judges required - 1 from each judicial district.
- View of effects on other water users limited to boundaries of judicial district. (Jurisdictional disputes).
- Until enforcement action, most Dist. Ct judges would have little exposure to adjudication process or decrees.

- Provision stating that "all Dist. Ct jurisdiction over federal and intertribal shall be exercised by WT Division judges" needs to be addressed!

2/3/89 10f3

Agriculture

VISITORS' REGISTER

[illegible]

29-

206

COMMITTEE ON Agriculture

VISITORS' REGISTER

[illegible]

(Please leave prepared statement with Secretary)

~~3x3~~

DATE _____

VISITORS' REGISTER

[illegible]

MINUTES

MONTANA SENATE 51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on February 13, 1989,
at 1:00 p.m.

ROLL CALL

Members Present: Senators: Hubert Abrams, Gary Aklestad,
Esther Bengtson, Gerry Devlin, Jack Galt, Greg
Jergeson, Gene Thayer, Bob Williams, Chairman Beck.

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council

Announcements/Discussion: None

DISPOSITION OF SENATE BILL 166

Discussion:

Senator Aklestad said he had a concern about adjudicated rights and is not convinced about the waste water provision in the bill. He mentioned that there were a couple irrigation projects where they do have extra water and they call it waste.

Senator Aklestad said he was not sure if there were different definitions of waste. He pointed out that the Muddy Creek coming off the Fairfield bench water would be waste. Senator Galt pointed out that waste was described as the unreasonable loss of water through the design and operation of any application of water through anything but a beneficial use.

Senator Aklestad pointed out another concern in the manner in which you can go in and readjudicate adjudicated water rights. It seems as though you could run through a preliminary decree or temporary preliminary decree. The water rights are nailed down now, have gone through the court systems, and now one more option is given to reopen that up. Chairman Beck pointed out that SB 76 opened up adjudicated rights.

Recommendation and Vote: Senator Galt moved that SB 166 DO PASS AS AMENDED. The motion passed with Senator Aklestad voting no.

DISPOSITION OF SENATE BILL 167

Discussion: A suggestion of a technical amendment to SB 167 and SB 169 made by Mr. Ross from the Denver consultants appears on the first page that accompanies the amendments to SB 167. These amendments were not included in the grey bill draft. If these provisions are to be included in the bill, the committee will need to act on them.

Amendments and Votes: Senator Galt moved the amendments. The question was called. The motion passed unanimously.

Recommendation and Vote: Chairman Beck said that SB 167 now had the technical amendments. A motion was made to move the bill as amended. Senator Jergeson said he was concerned that this bill provided for the reopening of streams that had final decree. He asked, "How many years could these be reopened?" He pointed out that these water bills could end up in conference committee in order to review them. It was pointed out that it was not sure that everyone had their day in court. If the final decree, came out and someone in another basin never had a chance to speak up but was affected by that final decree then they would have a chance to protest and have a day in court.

Senator Aklestad said that he had more opponents on the bill than proponents and wanted to know if the concerns of the Water Association, the Stockgrowers, and Ed Steinmetz had been taken care of. Chairman Beck pointed out that their concerns were the same as the Water Court, the DNRC, and the Water Compact. Mr. Steinmetz commented that the concerns were addressed.

Senator Galt moved that SB 167 DO PASS AS AMENDED. The motion carried unanimously.

DISPOSITION OF SENATE BILL 169

Doug Sternberg said that the Ross amendment, which was another technical amendment, needed to be acted on.

Amendments and Votes: Senator Galt moved to pass the technical amendments. The motion passed unanimously.

ROLL CALL

AGRICULTURE

COMMITTEE

DATE

2/13

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSON	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

14-

SENATE STANDING COMMITTEE REPORT

page 1 of 3
February 14, 1989

MR. PRESIDENT:

We, your committee on Agriculture, Livestock, and Irrigation, having had under consideration SB 166 (first reading copy -- white), respectfully report that SB 166 be amended and as so amended do pass:

1. Title, line 9.

Following: "DECREE"

Insert: "OR A PRELIMINARY DECREE"

2. Title, line 10.

Strike: ", OR A PRELIMINARY DECREE"

3. Page 2, line 14.

Strike: "subbasin"

Insert: "hydrologically interrelated portion of a water division as described in 85-2-231(2)"

4. Page 2, line 20.

Strike: "over the subbasin in which a controversy arises"

5. Page 2, lines 21 and 22.

Following: "decree" on line 21

Strike: the remainder of line 21 through "in" on line 22

Insert: ". In"

6. Page 2, line 24.

Following: line 23

Insert: "district court having jurisdiction may enforce the"

7. Page 2, line 25.

Following: "85-2-231"

Insert: ", as modified by a water judge after objections and hearings"

8. Page 3, line 24.

Strike: "chapter"

Insert: "part"

9. Page 3, line 25.

Following: "85-2-221"

Insert: "or an amended claim of existing right"

10. Page 4, line 3.

Following: "decree"

Insert: "or a preliminary decree"

35

11. Page 4, line 4.

Strike: "or a preliminary decree"

12. Page 4, line 16.

Following: "chapter"

Insert: "or when a basin is the subject of a temporary preliminary decree or preliminary decree, as modified after objections and hearings"

13. Page 4, line 17.

Following: "controversy"

Insert: "or any person whose rights are or may be affected by enforcement of the decree"

14. Page 4, line 19.

Following: "~~other~~"

Insert: "or other"

15. Page 4, lines 21 and 22.

Following: "~~decree~~"

Strike: "resolution of the controversy under subsection (3)"

Insert: "the issuance of the final decree"

16. Page 4, line 23 through page 6, line 5.

Following: "(3)" on line 23 of page 4.

Strike: the remainder of subsection (3) in its entirety.

Insert: "A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the district court that issued the final decree. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal enlargement or change of right. In cases involving permits issued by the department, ~~the~~ court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy must be appended to the final decree, and a copy must be filed with the department. The department must be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding.

(4) If an action to enforce a temporary preliminary decree is commenced, the water judge shall upon referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities.

(5)(a) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree may appeal a determination made pursuant to subsection (2) if he requested a hearing and appeared and entered objections to the temporary preliminary decree or preliminary decree.

(b) The water judge is not bound by a supreme court determination on an appeal entered under this subsection in issuing any subsequent decree under part 2 of this chapter."

17. Page 6, line 11.

Following: "jurisdiction,"

Insert: "including temporary preliminary, preliminary, and final decrees issued by a water judge,"

18. Page 9, line 8.

Following: "applicability."

Insert: "(1)"

19. Page 9, line 13.

Following: line 12

Insert: "(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

20. Page 9, line 17.

Strike: ", __Bill No. __ [LC 685],"

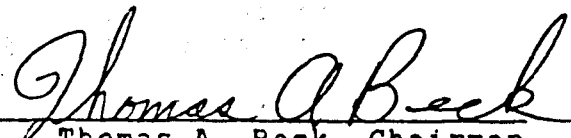
21. Page 9, lines 20 and 21.

Following: "[LC 683]" on line 20

Strike: ", __Bill No. __ [LC 685],"

AND AS AMENDED DO PASS

Signed:


Thomas A. Beck, Chairman

Amendments to Senate Bill No. 166
Introduced Reading Copy
For the Committee on Senate Agriculture

Prepared by Doug Sternberg, Committee Staff
February 11, 1989

1. Title, line 9.

Following: "DECREE"

Insert: "OR A PRELIMINARY DECREE"

2. Title, line 10.

Strike: ", OR A PRELIMINARY DECREE"

3. Page 2, line 14.

Strike: "subbasin"

Insert: "hydrologically interrelated portion of a water division
as described in 85-2-231(2)"

4. Page 2, line 20.

Strike: "over the subbasin in which a controversy arises"

5. Page 2, lines 21 and 22.

Following: "decree" on line 21

Strike: the remainder of line 21 through "in" on line 22

Insert: ". In"

6. Page 2, line 24.

Following: line 23

Insert: "district court having jurisdiction may enforce the"

7. Page 2, line 25.

Following: "85-2-231"

Insert: ", as modified by a water judge after objections and
hearings"

8. Page 3, line 24.

Strike: "chapter"

Insert: "part"

9. Page 3, line 25.

Following: "85-2-221"

Insert: "or an amended claim of existing right"

10. Page 4, line 3.

Following: "decree"

Insert: "or a preliminary decree"

11. Page 4, line 4.

Strike: "or a preliminary decree"

12. Page 4, line 16.

Following: "chapter"

Insert: "or when a basin is the subject of a temporary
preliminary decree or preliminary decree, as modified after

2/13/89

SB/66

objections and hearings"

13. Page 4, line 17.

Following: "controversy"

Insert: "or any person whose rights are or may be affected by enforcement of the decree"

14. Page 4, line 19.

Following: "~~ether~~"

Insert: "or other"

15. Page 4, lines 21 and 22.

Following: "~~decree~~"

Strike: "resolution of the controversy under subsection (3)"

Insert: "the issuance of the final decree"

16. Page 4, line 23 through page 6, line 5.

Following: "(3)" on line 23 of page 4.

Strike: the remainder of subsection (3) in its entirety.

Insert: "A controversy between appropriators from a source that has been the subject of a final decree under part 2 of this chapter must be settled by the district court that issued the final decree. The order of the district court settling the controversy may not alter the existing rights and priorities established in the final decree except to the extent the court alters rights based upon abandonment, waste, or illegal enlargement or change of right. In cases involving permits issued by the department, the court may not amend the respective rights established in the permits or alter any terms of the permits unless the permits are inconsistent or interfere with rights and priorities established in the final decree. The order settling the controversy must be appended to the final decree, and a copy must be filed with the department. The department must be served with process in any proceeding under this subsection, and the department may, in its discretion, intervene in the proceeding."

(4) If an action to enforce a temporary preliminary decree is commenced, the water judge shall upon referral from the district court establish, in a form determined to be appropriate by the water judge, one or more tabulations or lists of all existing rights and their relative priorities. .

(5)(a) A person whose existing rights and priorities are determined in a temporary preliminary decree or preliminary decree may appeal a determination made pursuant to subsection (2) if he requested a hearing and appeared and entered objections to the temporary preliminary decree or preliminary decree.

(b) The water judge is not bound by a supreme court determination on an appeal entered under this subsection in issuing any subsequent decree under part 2 of this chapter."

17. Page 6, line 11.

Following: "jurisdiction,"

Ex. #1
2/13/89
SB 166

Insert: "including temporary preliminary, preliminary, and final decrees issued by a water judge,"

18. Page 9, line 8.

Following: "applicability."

Insert: "(1)"

19. Page 9, line 13.

Following: line 12

Insert: "(2) A person whose existing rights are determined in a temporary preliminary decree or a preliminary decree issued before [the effective date of this act] may petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree."

20. Page 9, line 17.

Strike: ", __Bill No. __ [LC 685],"

21. Page 9, lines 20 and 21.

Following: "[LC 683]" on line 20

Strike: ", __Bill No. __ [LC 685],"

CHAIRMAN--DAVE BROWN

NORMAL SCHEDULE==> SITE: ROOM 312-2

DAYS: M,T,W,T,F

TIME: 8:00 A.M.

SECRETARY--JULIE EMGE

--BILL NO--	REFER DATE	HEARING DATE	CONSIDERATION DATES	COMMITTEE ACTION	REREFERRED TO COMM	DATE OUT
SB0131	2/21	3/08		CONCUR		3/08
MAZUREK, JOE UNIFORM STATUTORY RULE AGAINST PERPETUITIES						
SB0135	2/21	3/03		CONCUR		3/03
HALLIGAN, MIKE CLARIFY TOOLS OF TRADE EXEMPTION						
SB0140	2/21	2/28		CONCUR AS AMENDED		3/01
JERGESON, GREG POSSESSION OF P2P PUNISHABLE AS PRECURSORS TO DANGEROUS DRUGS						
SB0145	2/21	3/10		CONCUR		3/10
ECK, DOROTHY VETERANS, SOC. SEC. BENEFITS NOT EXEMPT FROM EXECUTION FOR CHILD SUPPORT						
SB0157	2/21	3/06		CONCUR		3/06
NATHE, DENNIS REVISE CIVIL STATUTE LIMITATIONS CHILD SEX ABUSE						
SB0164	2/21	3/15		TABLED		
RASMUSSEN, TOM REQUIRING MINOR TO NOTIFY PARENTS PRIOR TO OBTAINING ABORTION						
SB0166	2/27	3/20		CONCUR AS AMENDED		3/21
BENGTON, ESTHER PROVIDES FOR ADMINISTRATION OF TEMPORARY PRELIMINARY AND PRELIMINARY DECREES						
SB0167	2/27	3/20		CONCUR AS AMENDED		3/21
BENGTON, ESTHER REOPENS WATER RIGHT DECREES FOR OBJECTIONS ON ISSUES NOT PREVIOUSLY RESOLVED						
SB0168	2/27	3/20		CONCUR		3/21
BENGTON, ESTHER ALLOWS CORRECTION OF CLERICAL MISTAKES IN FINAL DECREES OF WATER RIGHTS						
SB0169	2/27	3/20		CONCUR AS AMENDED		3/21
BENGTON, ESTHER PROVIDES FOR TEMPORARY PRELIMINARY DECREES AND FOR OBJECTIONS ON THE DECREES						
SB0170	2/21	2/28		CONCUR		3/01
JERGESON, GREG ALLOW DANGEROUS OFFENDER DESIGNATION ON REVOCATION OF PROBATION						

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dave Brown, on March 20, 1989, at
8:10 a.m.

ROLL CALL

Members Present: All members were present with the following
exception:

Members Excused: Rep. Kelly Addy

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

Announcements/Discussion: None.

HEARING ON SENATE BILLS 166, 167, 168, 169

Presentation and Opening Statement by Sponsor:

Sen. Esther Bengtson, Senate District 49 presented an exhibit that explained how the adjudication process began and that these bills are being introduced to clarify the adjudication process in Montana (EXHIBIT 1).

Sen. Bengtson presented exhibits for SB's 166, 167, 168, and 169 (See EXHIBITS 2, 3, 4, and 5).

Testifying Proponents and Who They Represent:

Jack Ross, Water Quality Committee
Jo Bruner, Executive Secretary, Montana Water Resources Assoc.
Ted Downey, Attorney Specializing in Water Law

Proponent Testimony:

Jack Ross stated that Montana has a very fine adjudication system. He said that he found that the statute did not have, as many of the states in the west do, a specific provision for the correction of clerical errors and decree. When they look at the need to adjudicate over 200,000 water rights in a time frame that is greatly collapsed by any other standards in the west, they have to recognize the possibility of such errors occurring and it is appropriate to provide mechanism for fixing those. The water courts had followed a practice where it was necessary for

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administrative purposes to issue temporary preliminary decrees, before they were in position to enter what were provided in the statute for preliminary decrees. Another problem was that under existing law only final decrees can be administered. He proposed two amendments for SB 166 and SB 169 (EXHIBITS 6 and 7).

Jo Bruner stated that the Montana Water Resources Association supports these bills as they came out of the Senate.

Ted Downey stated he supports the amendments that have been generated by the Water Policy Committee. Many concerns that they had on the bills is SB 169 appears that the water court finds good cause to hold a hearing on every objection to a water right claim. Under the current law the statute says that the department can object to a water right claim or any person who is named in a decree can object to a claim and get a hearing without the water court finding good cause for that objection. Good cause is required to have a hearing by any other person who files objections that was not named in the decree.

Testifying Opponents and Who They Represent:

Richard Aldrich, Field Consultant, Department of Interior

Opponent Testimony:

Richard Aldrich stated that the function of SB 169 is that it gives the authority to the water courts for the issuance of preliminary decrees and it also defines how they may be used and administered. It provides for notice in the basin and provides for specific notice, prospectively by publication to water right holders outside a basin within a water shed. This provides for them an opportunity to appear an object to matters that may be determined in those decrees. Mr. Aldrich presented proposed amendments to SB 169 (EXHIBIT 8).

Questions From Committee Members: Rep. Brown asked Mr. Ross what he thought about the amendments. Mr. Ross stated that the question that Mr. Downey proposed dealt with a necessity for a good cause to be shown in order to object. He said he agreed that it is correct with respect to the original statute that the rights of the department people be named and the temporary preliminary decree to object did not require a showing of good cause. The distinction was made for other persons who may want to appear would have to show they had good cause for such an objection.

Rep. Brown asked Ed Steinmetz, Water Master for the Water Court, with the failure of his testimony for these bills does this mean he is neutral. Mr. Steinmetz stated that he didn't take a position because the Water Court is basically neutral and recognized its position as a court. They have worked in drawing up the amendments and although there are concerns,

there are still some concerns that do exist.

Rep. Brown questioned Mr. Aldrich if he was representing each of the five agencies as well with these statements or is this the general department divisions. Mr. Aldrich stated it is the departments position and the agencies as well.

Rep. Brown asked Mr. Aldrich if he had seen Mr. Ross' amendment that proposes to strike subsection C on SB 169. Mr. Aldrich stated that he has seen the amendments and said that his concern is more fundamental than simply with subsection C. It goes to the very process and the effect of the two track adjudication.

Rep. Brown commented to Mr. Aldrich that ten years ago when they set up the water adjudication process in Montana, they created a two track system at the federal governments request. Is he saying that he doesn't like the system the way it was done? Mr. Aldrich responded that what they are objecting to is the temporary decree process which they are proposing to codify, which was something invented by the court so that he court could move forward in areas where the adjudication they thought was going to be suspended. It was their impression that the adjudication would be completely suspended with respect to all parties in basins where they were negotiating entities particularly to the Indian tribes. The Water Court then invented the TPD process to allow the Water Court to issue decrees involving only the state appropriative claims in basins where there are reserved rights which are being negotiated.

Rep. Hannah asked Mr. Aldrich what would happen if they didn't pass the law. Would it improve their position with the department on the current practices of the court? Mr. Aldrich replied that they believe that if they don't pass the law it should send a message to the court that this is perhaps an authorized procedure. The court has been relying on the statute that allows them to enter other temporary decrees for the purposes of administration or for other purposes.

Rep. Brooke asked Mr. Ross if he could give an example of the procedures that he is referring to on page 4, lines 1-10. Mr. Ross stated that until a decree is issued for a claim, the claim constitutes prima facia evidence of the elements of a water right the person has claimed. In those basins where the adjudication has not reached the level of a temporary preliminary decree or preliminary decree, and under this provision would allow administration, then the District Court to consider the claim stated as prima facia evidence of the right in its determination of how administration would go forward. As soon as the Water Court has entered a temporary decree or a preliminary decree the material determined in the claim is no longer prima facia evidence for administrative purposes. Then they would move

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to the decretal provision to determine how the administration will proceed.

Rep. Brown questioned Mr. Steinmetz if he would address Mr. Downey's concern on the good cause showing on page 6 in SB 169 and how does the court presently interpret that. Mr. Steinmetz stated that he wasn't aware of Mr. Downey's proposed amendment, but it is his impression that the way the court has read the statute and has interpreted it to this point, good cause is required for each of those entities for the department, anyone named in the decree, or for any other person. They construe good cause for the department to be very broad, they don't just require them to have a personal interest in the matter. The danger in taking out good cause requirement for people named in the decree is if there isn't good cause it gives them a reason to dismiss a harassing or spite objection.

Rep. Brown asked Mr. Downey if he would agree that the decision in this area is pretty much a policy decision on how it should apply. It is a question of whether the committee thinks it should apply across the board or be limited in the fashion that he would like. Mr. Downey commented that if the Water Court had been interpreting it the way they have, it appears it is working out satisfactorily, but the people aren't aware of that interpretation.

Closing by Sponsor: Sen. Bengtson stated that they must proceed. They feel that they have addressed the concerns of the federal government. The amendments, which address the federal government, were drafted by people from the Dept. of Natural Resources and from the Compact Commission that deals with the water rights. She commented that she doesn't feel they need anymore amendments.

DISPOSITION OF SENATE BILL 166

Motion: Rep. Stickney moved SB 166 BE CONCURRED IN, motion seconded by Rep. Nelson.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Eudaily moved SB 166 be amended as follows:

Page 7, line 15

Following: "DECREE"

Insert: ", or a person exercising a suspension under 85-
2- 217 and part of 7 of this chapter,"

Page 7, lines 16 through 18

Strike: "IF HE" on line 16 through "DECREE" on line 18

The amendments were seconded by Rep. Nelson and CARRIED unanimously.

Recommendation and Vote: Rep. Darko moved SB 166 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Nelson. Motion CARRIED with Rep. Boharski voting against the motion.

DISPOSITION OF SENATE BILL 167

Motion: Rep. Wyatt moved SB 167 BE CONCURRED IN, motion seconded by Rep. Darko.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Mercer moved the bill be amended as follows:

Page 2, lines 15 through 18

Strike: "A PERSON" on line 15 through the end of line 18

The amendment was seconded by Rep. Eudaily and CARRIED with Rep.'s Daily, Darko, Wyatt, Strizich, Brown, and McDonough voting Nay.

Recommendation and Vote: Rep. Knapp moved SB 167 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Stickney. Motion CARRIED with Rep. Daily voting against the motion.

DISPOSITION OF SENATE BILL 168

Motion: Rep. Nelson moved SB 168 BE CONCURRED IN. Rep. Wyatt seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: Question was called for on the motion and CARRIED unanimously.

DISPOSITION OF SENATE BILL 169

Motion: Rep. Wyatt moved SB 169 BE CONCURRED IN. Rep. Nelson seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Wyatt moved SB 169 be amended as follows:

Page 7, lines 7-16

Strike: subsection (c) in its entirety

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DAILY ROLL CALL

JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date March 20, 1989

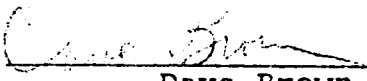
NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN			X
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH	X		
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

STANDING COMMITTEE REPORT

March 20, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 166 (third reading copy -- blue) be concurred in as amended .

Signed: 
Dave Brown, Chairman

And, that such amendments read:

1. Page 7, line 15.

Following: "DECREE"

Insert: ", or a person exercising a suspension under 85-2-217 and part 7 of this chapter,"

2. Page 7, lines 16 through 18.

Strike: "IF HE" on line 16 through "DECREE" on line 18

SOME BASICS CONCERNING THE WATER RIGHTS ADJUDICATION PROCESS

March 1989

1. The Montana Water Courts are organized into four divisions:

- the Upper Missouri River Basin (Chief Judge W.W. Lessley);
- the Lower Missouri River Basin (Judge Bernard W. Thomas);
- the Clark Fork River Basin (Judge Leif Erickson); and
- the Yellowstone River Basin (Judge Roy C. Rodeghiero).

2. The current adjudication laws went into effect with the passage of Senate Bill 76 in 1979. The deadline for filing claims of existing (pre-July 1, 1973) rights was April 30, 1982. Over 203,000 claims were filed.

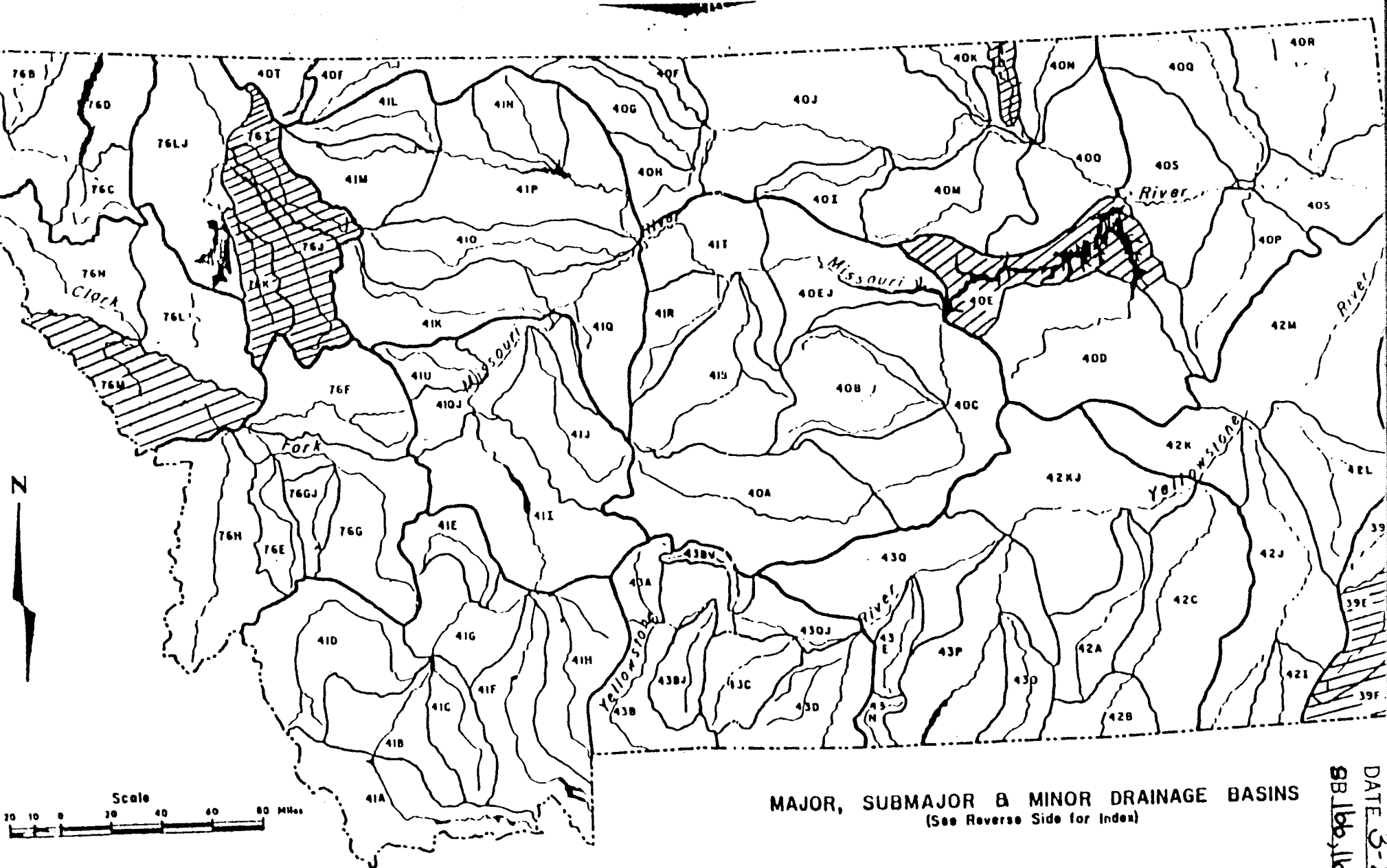
3. Since 1982, the Water Courts have been reviewing the claims and issuing decrees in various subbasins. There are 85 subbasins in Montana.

4. The Water Courts issue three types of decrees. A temporary preliminary decree is issued for non-federal and Indian claims in any basin where the federal and Indian claims remain unresolved because of negotiations with the Reserved Water Rights Compact Commission. A preliminary decree is issued when all claims (state-based and federal and Indian claims) are before the court. Senate Bill 169 ensures that both of these decrees are subject to extensive notice and opportunity for objections and hearings.

Finally, after considering all objections and the evidence before it, the Water Court issues a final decree.

5. The Department of Natural Resources and Conservation is required to assist the Water Courts. The DNRC's functions include maintaining the data base and examining claims for accuracy. Claim examination normally involves in-house review, including air photo interpretation, but can at times involve examination by field office staff at the site of the claim.

6. With funding from a special appropriation, the Water Policy Committee hired Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado to examine the water rights adjudication process to determine if it is legally adequate, particularly if a challenge occurred under the McCarran Amendment (which allows states to adjudicate federal and Indian claims).



MAJOR, SUBMAJOR & MINOR DRAINAGE BASINS
(See Reverse Side for Index)

DATE 5-20-87
SB 166, 167, 168 + 169

EXHIBIT 2
DATE 3-20-89
SB 166

The Water Rights Adjudication Bills
By Request of the Water Policy Committee
Senator Esther Bengtson, sponsor
March 20, 1989

The Water Policy Committee's principal agenda item for the 1987-1989 interim was Montana's water rights adjudication process. This focus resulted from an appropriation by the 1987 Legislature to hire a consultant with no conflict of interest to review and analyze the adjudication process. The consultant's report, and the committee's final conclusions, stress that the adjudication process is working properly but that some minor legislative changes are needed to ensure that the results sought by the legislature in 1979 are achieved.

Several technical amendments are added to these bills by the Senate Agriculture Committee as a result of discussions and consensus recommendations offered by technical persons attached to the Water Policy Committee, the Water Courts, the DNRC, and the Reserved Water Rights Compact Commission.

I. Senate Bill 166

This bill enables the district courts to administer or enforce water rights according to a temporary preliminary decree or a preliminary decree, as modified after objections and hearings. Under existing law, only final decrees may be administered.

The bill also places water rights administration solely with the district courts, thereby emphasizing the water courts' principal adjudication function. The major sections of the bill are sections 2, 3, 5, 6 and 7.

Section 2

Section 3-7-211 is amended so that exclusive authority for administration of decrees lies with the district courts and not the water courts. The amendment emphasizes the role of the water courts in adjudicating existing water rights, not administering them. Water commissioners appointed by the district court have authority to distribute water according to the terms of the decree, as modified after objections and hearings.

Section 3

This section is fundamental to the bill. Note that the district court has jurisdiction and that the district court can administer not only a final decree but also temporary preliminary and preliminary decrees.

Senate Bill 166 -- Page 2

Section 5

Under existing law (85-2-227), a properly filed claim of existing right constitutes prima facie proof of its contents until a final decree is issued. This amendment modifies the prima facie status of a claim or amended claim for administration purposes only by stating that the claim is superseded by the issuance of a temporary preliminary decree or preliminary decree, as modified after objections and hearings. The change ensures that rights will be administered according to the most accurate determination available.

Section 6

This section amends 85-2-406 to describe how the district court shall resolve water distribution controversies and enforce decrees. The Senate Agriculture Committee amendments restate much of the original statute and provide for enforcement of temporary preliminary and preliminary decrees in subsection (2).

Again, the district courts supervise this process. If the matter involves an existing (pre-July 1, 1973) water right that has not been adjudicated in a final decree, the part of the controversy involving the determination of the pre-July 1, 1973 right would be referred to the water courts.

Subsection (5) provides an appeals process to persons who might be harmed by the administration of a temporary preliminary or preliminary decree. Otherwise, the person would have to wait until the final decree is issued. [Note amendments]

Section 7

The amendments allow for the appointment of a water commissioner to administer or enforce a temporary preliminary, preliminary or final decree.

Section 11

The applicability section allows a person whose rights are already determined in an existing temporary preliminary decree or preliminary decree to petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree (a mini-reopening provision).

Section 12

The effective date for this bill and Senate Bills 167 and 169 is when the last bill receives final action.

Exhhibits 3-8 are not for SB 166.

Amendments to Senate Bill No. 166
Third Reading Copy
For the House Judiciary Committee
Requested by Senator Bengtson
March 17, 1989

1. Page 7, line 15.

Following: "DECREE"

Insert: "or a person exercising a suspension under part 7 of
this chapter"

2. Page 7, lines 16 through 18.

Following: "(2)" on line 16

Strike: remainder of line 16 through DECREE" on line 18

These amendments would allow appeals of enforcement actions to the Supreme Court by 1) a person whose rights and priorities are determined in a temporary preliminary decree or preliminary decree or 2) a tribe or federal agency exercising a suspension under part 7.

appr2

JUDICIARY

BILL NO. SENATE BILL 166

DATE MARCH 20, 1989

SPONSOR SEN. BENGTON

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

SENATE BILL NO. 166

INTRODUCED BY BENGTSON, GALT, STORY, STIMATZ,

SPAETH, MARKS, BRADLEY, IVERSON

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR ADMINISTRATION OF TEMPORARY PRELIMINARY AND PRELIMINARY DECREES BY THE DISTRICT COURTS; PROVIDING THAT FOR PURPOSES OF ADMINISTERING WATER RIGHTS, THE PRIMA FACIE STATUS OF A CLAIM IS SUPERSEDED BY THE ISSUANCE OF A TEMPORARY PRELIMINARY DECREE OR A PRELIMINARY DECREE, AS MODIFIED AFTER OBJECTIONS AND HEARINGS;--OR--A--PRELIMINARY--DECREE; AMENDING SECTIONS 3-7-201, 3-7-211, 3-7-212, 3-7-501, 85-2-227, 85-2-406, AND 85-5-101, MCA; REPEALING SECTION 3-7-213, MCA; AND PROVIDING AN EFFECTIVE DATE AND RETROACTIVE AND PROSPECTIVE APPLICABILITY."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 3-7-201, MCA, is amended to read:

"3-7-201. Designation of water judge. (1) A water judge shall be designated within 30 days after May 11, 1979, for each water division by a majority vote of a committee composed of the district judge from each single judge judicial district and the chief district judge from each multiple judge judicial district, wholly or partly within the division. Except as provided in subsection (2) and

3-7-213, a water judge must be a district judge or retired district judge of a judicial district wholly or partly within the water division.

(2) A district judge or retired district judge may sit as a water judge in more than one division if requested by the chief justice of the supreme court or the water judge of the division in which he is requested to sit.

(3) A water judge, when presiding over a water division, presides as district judge in and for each judicial district wholly or partly within the water division."

Section 2. Section 3-7-211, MCA, is amended to read:

"3-7-211. Appointment of water commissioners. The ~~water--judge--of--each--water--division~~ district court having jurisdiction over the subbasin HYDROLOGICALLY INTERRELATED PORTION OF A WATER DIVISION AS DESCRIBED IN 85-2-231(2) in which the controversy arises may appoint and supervise a water commissioner as provided for in Title 85, chapter 5."

Section 3. Section 3-7-212, MCA, is amended to read:

"3-7-212. Enforcement of final--decree decrees. The ~~water-judge-of-each-water--division~~ district court having jurisdiction over the subbasin in which a controversy arises may enforce the provisions of a final decree ~~issued in for that water division as provided in 85-2-234~~ subbasin or in IN the absence of any final decree having been issued, the

DISTRICT COURT HAVING JURISDICTION MAY ENFORCE THE provisions of a temporary preliminary decree or preliminary decree entered under 85-2-231, AS MODIFIED BY A WATER JUDGE AFTER OBJECTIONS AND HEARINGS."

Section 4. Section 3-7-501, MCA, is amended to read:

"3-7-501. Jurisdiction. (1) The jurisdiction of each judicial district concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights is exercised exclusively by it through the water division or water divisions that contain the judicial district wholly or partly.

(2) No water judge may preside over matters concerning the determination and interpretation of cases certified to the court under 85-2-309 or of existing water rights beyond the boundaries specified in 3-7-102 for his division except as provided in 3-7-201 and 3-7-213.

(3) The water judge for each division shall exercise jurisdiction over all matters concerning cases certified to the court under 85-2-309 or concerning the determination and interpretation of existing water rights within his division as specified in 3-7-102 that are considered filed in or transferred to a judicial district wholly or partly within the division."

Section 5. Section 85-2-227, MCA, is amended to read:

"85-2-227. Claim to constitute prima facie evidence. A For purposes of adjudicating rights pursuant to this chapter PART, a claim of an existing right filed in accordance with 85-2-221 OR AN AMENDED CLAIM OF EXISTING RIGHT constitutes prima facie proof of its content until the issuance of a final decree. For purposes of administering water rights, the provisions of a temporary preliminary decree OR A PRELIMINARY DECREE, as modified after objections and hearings, ~~or a preliminary decree~~ supersede a claim of existing right until a final decree is issued."

Section 6. Section 85-2-406, MCA, is amended to read:

"85-2-406. District court supervision of water distribution. (1) The district courts shall supervise the distribution of water among all appropriators. This supervisory authority includes the supervision of all water commissioners appointed prior or subsequent to July 1, 1973. The supervision shall be governed by the principle that first in time is first in right.

(2) When a water distribution controversy arises upon a source of water in which existing rights have not been determined according to part 2 of this chapter OR WHEN A BASIN IS THE SUBJECT OF A TEMPORARY PRELIMINARY DECREE OR PRELIMINARY DECREE, AS MODIFIED AFTER OBJECTIONS AND HEARINGS, any party to the controversy OR ANY PERSON WHOSE RIGHTS ARE OR MAY BE AFFECTED BY ENFORCEMENT OF THE DECREE

1 may petition the district court for relief. The district
 2 court from which relief is sought may grant such injunctive
 3 or other OR OTHER relief which is necessary and appropriate
 4 to preserve property rights or the status quo pending the
 5 issuance of the final decree resolution of the controversy
 6 under subsection (3) THE ISSUANCE OF THE FINAL DECREE.

7 (3) A controversy between appropriators from a source
 8 which has been the subject of a general determination of
 9 existing rights under part 2 of this chapter shall be
 10 settled by the district court which issued the final decree
 11 having jurisdiction over the subbasin in which the
 12 controversy arises. The order of the district court settling
 13 the controversy may not alter the existing rights and
 14 priorities established in the final decree; a temporary
 15 preliminary decree or preliminary decree entered under part
 16 2 of this chapter but shall refer to the appropriate water
 17 court any portion of the controversy involving the nature of
 18 existing rights and priorities established in a temporary
 19 preliminary decree or preliminary decree. The water court
 20 shall resolve any controversy involving existing rights and
 21 priorities established in a temporary preliminary decree or
 22 preliminary decree. Upon rereferral from the water court,
 23 the district court shall enter an order that it determines
 24 to be consistent with the resolution of the issues referred
 25 by the water court in resolving the controversy, the

1 ~~district court may alter rights and priorities contained in~~
 2 ~~a final decree only if based upon abandonment, waste, or~~
 3 ~~illegal enlargement or change of right. In cases involving~~
 4 ~~permits issued by the department, neither the water court~~
 5 ~~nor the district court may not amend the respective rights~~
 6 ~~established in the permits or alter any terms of the permits~~
 7 ~~unless the permits are inconsistent or interfere with rights~~
 8 ~~and priorities established in the a final decree entered~~
 9 ~~under part 2 of this chapter. The order settling the~~
 10 ~~controversy shall be appended to the final decree, and a~~
 11 ~~copy shall be filed with the department. The department~~
 12 ~~shall be served with process in any proceeding under this~~
 13 ~~subsection, and the department may, in its discretion,~~
 14 ~~intervene in the proceeding. A CONTROVERSY BETWEEN~~
 15 ~~APPROPRIATORS FROM A SOURCE THAT HAS BEEN THE SUBJECT OF A~~
 16 ~~FINAL DECREE UNDER PART 2 OF THIS CHAPTER MUST BE SETTLED BY~~
 17 ~~THE DISTRICT COURT THAT ISSUED THE FINAL DECREE. THE ORDER~~
 18 ~~OF THE DISTRICT COURT SETTLING THE CONTROVERSY MAY NOT ALTER~~
 19 ~~THE EXISTING RIGHTS AND PRIORITIES ESTABLISHED IN THE FINAL~~
 20 ~~DECREE EXCEPT TO THE EXTENT THE COURT ALTERS RIGHTS BASED~~
 21 ~~UPON ABANDONMENT, WASTE, OR ILLEGAL ENLARGEMENT OR CHANGE OF~~
 22 ~~RIGHT. IN CASES INVOLVING PERMITS ISSUED BY THE DEPARTMENT,~~
 23 ~~THE COURT MAY NOT AMEND THE RESPECTIVE RIGHTS ESTABLISHED IN~~
 24 ~~THE PERMITS OR ALTER ANY TERMS OF THE PERMITS UNLESS THE~~
 25 ~~PERMITS ARE INCONSISTENT OR INTERFERE WITH RIGHTS AND~~

PRIORITIES ESTABLISHED IN THE FINAL DECREE. THE ORDER
SETTLING THE CONTROVERSY MUST BE APPENDED TO THE FINAL
DECREE, AND A COPY MUST BE FILED WITH THE DEPARTMENT. THE
DEPARTMENT MUST BE SERVED WITH PROCESS IN ANY PROCEEDING
UNDER THIS SUBSECTION, AND THE DEPARTMENT MAY, IN ITS
DISCRETION, INTERVENE IN THE PROCEEDING.

(4) IF AN ACTION TO ENFORCE A TEMPORARY PRELIMINARY
DECREE IS COMMENCED, THE WATER JUDGE SHALL UPON REFERRAL
FROM THE DISTRICT COURT ESTABLISH, IN A FORM DETERMINED TO
BE APPROPRIATE BY THE WATER JUDGE, ONE OR MORE TABULATIONS
OR LISTS OF ALL EXISTING RIGHTS AND THEIR RELATIVE
PRIORITIES.

(5) (A) A PERSON WHOSE EXISTING RIGHTS AND PRIORITIES
ARE DETERMINED IN A TEMPORARY PRELIMINARY DECREE OR
PRELIMINARY DECREE OR A PERSON EXERCISING A SUSPENSION UNDER
85-2-217 AND PART 7 OF THIS CHAPTER MAY APPEAL A
DETERMINATION MADE PURSUANT TO SUBSECTION (2) IF--HE
REQUESTED--A--HEARING-AND-APPEARED-AND-ENTERED-OBJECTIONS-TO
THE-TEMPORARY-PRELIMINARY-DECREE-OR-PRELIMINARY-DECREE.

(B) THE WATER JUDGE IS NOT BOUND BY A SUPREME COURT
DETERMINATION ON AN APPEAL ENTERED UNDER THIS SUBSECTION IN
ISSUING ANY SUBSEQUENT DECREE UNDER PART 2 OF THIS CHAPTER."

Section 7. Section 85-5-101, MCA, is amended to read:

"85-5-101. Appointment of water commissioners. (1)
Whenever the rights of persons to use the waters of any

stream, ditch or extension of ditch, watercourse, spring,
lake, reservoir, or other source of supply have been
determined by a decree of a court of competent jurisdiction,
INCLUDING TEMPORARY PRELIMINARY, PRELIMINARY, AND FINAL
DECREES ISSUED BY A WATER JUDGE, it shall be the duty of the
judge of the district court having jurisdiction of the
subject matter, upon the application of the owners of at
least 15% of the water rights affected by the decree, in the
exercise of his discretion, to appoint one or more
commissioners. The commissioners shall have authority to
admeasure and distribute to the parties owning water rights
in the source affected by the decree the waters to which
they are entitled, according to their rights as fixed by the
decree and by any certificates and permits issued under
chapter 2 of this title. When petitioners make proper
showing that they are not able to obtain the application of
the owners of at least 15% of the water rights affected and
they are unable to obtain the water to which they are
entitled, the judge of the district court having
jurisdiction may, in his discretion, appoint a water
commissioner.

(2) When the existing rights of all appropriators from
a source or in an area have been determined in a temporary
preliminary decree, preliminary decree, or final decree
issued under chapter 2 of this title, the judge of the

1 district court shall upon application by the department of
2 natural resources and conservation appoint a water
3 commissioner. The water commissioner shall distribute to the
4 appropriators, from the source or in the area, the water to
5 which they are entitled.

6 (3) The department of natural resources and
7 conservation or any person or corporation operating under
8 contract with the department or any other owner of stored
9 waters may petition the court to have such stored waters
10 distributed by the water commissioners appointed by said
11 court. The court may thereupon make an order requiring the
12 commissioner or commissioners appointed by the court to
13 distribute such stored water when and as released to water
14 users entitled to the use thereof.

15 (4) At the time of the appointment of such water
16 commissioner or commissioners, the district court shall fix
17 their compensation, and the owners and users of the
18 distributed waters, including permittees and certificate
19 holders, shall pay their proportionate share of such fees
20 and compensation.

21 (5) Upon the application of the board or boards of one
22 or more irrigation districts entitled to the use of water
23 stored in a reservoir which is turned into the natural
24 channel of any stream and withdrawn or diverted at a point
25 downstream for beneficial use, the district court of the

1 judicial district wherein the most irrigable acres of the
2 irrigation district or districts are situated may appoint a
3 water commissioner to equitably admeasure and distribute
4 such stored water to said irrigation district or districts
5 from the channel of the stream into which it has been
6 turned. A commissioner appointed under this subsection has
7 the powers of any commissioner appointed under this chapter,
8 limited only by the purposes of this subsection. His
9 compensation is set by the appointing judge and paid by each
10 district and other users of stored water affected by the
11 admeasurement and distribution of such stored water. In all
12 other matters the provisions of this chapter apply so long
13 as they are consistent with this subsection."

14 NEW SECTION. **Section 8. Repealer.** Section 3-7-213,
15 MCA, is repealed.

16 NEW SECTION. **Section 9. Saving clause.** [This act]
17 does not affect rights and duties that matured, penalties
18 that were incurred, or proceedings that were begun before
19 [the effective date of this act].

20 NEW SECTION. **Section 10. Severability.** If a part of
21 [this act] is invalid, all valid parts that are severable
22 from the invalid part remain in effect. If a part of [this
23 act] is invalid in one or more of its applications, the part
24 remains in effect in all valid applications that are
25 severable from the invalid applications.

1 NEW SECTION. Section 11. Retroactive and prospective
2 applicability. (1) [This act] applies retroactively, within
3 the meaning of 1-2-109, to all temporary preliminary decrees
4 and preliminary decrees that have been issued by the Montana
5 water courts and prospectively to all decrees issued on or
6 after [the effective date of this act].

7 (2) A PERSON WHOSE EXISTING RIGHTS ARE DETERMINED IN A
8 TEMPORARY PRELIMINARY DECREE OR A PRELIMINARY DECREE ISSUED
9 BEFORE [THE EFFECTIVE DATE OF THIS ACT] MAY PETITION THE
10 WATER JUDGE FOR RELIEF CONCERNING ANY MATTER IN THE DECREE
11 PRIOR TO ENFORCEMENT OF THE DECREE.

12 NEW SECTION. Section 12. Effective date. [This act]
13 becomes effective on the latest date on which any of the
14 following occurs:

15 (1) passage and approval of [this act], __ Bill No. __
16 [LC 683], ~~-----Bill--No--{bE-685}~~, or __ Bill No. __ [LC
17 686]; or

18 (2) a final determination of failure to receive
19 passage and approval of __ Bill No. __ [LC 683], ~~-----Bill--No--~~
20 ~~---{bE-685}~~, or __ Bill No. __ [LC 686].

-End-